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INSTANTCOLOR SYSTEM SDN BHD v. INKMAKER ASIA PACIFIC SDN BHD

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
MD RAUS SHARIF PCA
B SURIYADI HALIM OMAR FCJ
RAMLY ALI FCJ
AZAHAR MOHAMED FCJ
[CIVIL APPEAL NO: 02(f)-85-11-2015(B)]
2 MARCH 2017

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CIVIL PROCEDURE: *Appeal – Pleadings – Exception to limitation period – Issues raised for first time during hearing of appeal – Whether radical departure from pleaded case – Whether issues must be specifically pleaded in pleadings – Whether issues should be allowed to be raised – Limitation Act 1953, ss. 6 & 22*

D

CIVIL PROCEDURE: *Parties – Joinder of parties – Second defendant joined as co-defendant after expiry of limitation period – Whether power of amendment extends to amendment of adding new defendant after expiry of limitation period – Whether doctrine of relation back applicable – Whether amendments prejudiced opposing party's rights – Whether second defendant could rely on defence of* E *limitation – Limitation Act 1953, s. 6 – Rules of the High Court 1980, O. 20 r. 5(2)*

LIMITATION: *Pleading, amendment of – Inclusion of parties to action – Second defendant joined as co-defendant after expiry of limitation period – Whether power* F *of amendment extends to amendment of adding new defendant after expiry of limitation period – Whether doctrine of relation back applicable – Whether amendments prejudiced opposing party's rights – Whether action against second defendant time-barred – Limitation Act 1953, s. 6 – Rules of the High Court 1980, O. 20 r. 5(2)*

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The respondent ('plaintiff'), a manufacturer and dealer of paint and ink dispensing machines as well as other ancillary machines in Malaysia, was set up by the first defendant as a joint venture enterprise with an Italian company. The first defendant was initially one of the pioneer directors and shareholders holding 15% equity in the plaintiff. Subsequently, the first defendant resigned as a director and disposed off his shares in the plaintiff H and signed an agreement to work as a regional manager for the plaintiff, with a fixed salary and sales commission. The contract of employment and its subsequent extension contained a non-competition clause and a confidentiality clause. However, when the first defendant was absent from work without any valid reason or notice, the plaintiff terminated the first I defendant's employment. The first defendant then commenced employment with the appellant ('the second defendant'), a company carrying on the business, *inter alia*, of assembling dispensing machines. The first defendant

was a director of the second defendant. The plaintiff alleged that while being employed with the plaintiff, the first defendant had worked towards the setting up of the second defendant with the purpose of competing with the plaintiff, thus acting in breach of his fiduciary duty towards the plaintiff. The plaintiff filed a suit against the first defendant alleging that the first defendant had breached the non-competition and confidentiality terms of his employment contract during the currency of his employment, as well as after the cessation of his employment with the plaintiff. Eight years after the commencement of the suit, the second defendant was added in the proceedings at the High Court and the writ and statement of claim was amended to plead a cause of action against the second defendant. The second defendant's defence, *inter alia*, was that the plaintiff's cause of action against the second defendant (if any) was time-barred. The High Court dismissed the plaintiff's claim and the plaintiff appealed. In the Court of Appeal, the plaintiff raised the issue of limitation, contending that the High Court erred in holding that the plaintiff's suit against the second defendant was time-barred under s. 6 of the Limitation Act 1953 ('the Act'). In allowing the plaintiff's appeal, the Court of Appeal ruled that the general rule is that the writ relates back to the date of the original writ, so that the plaintiff's claim against the second defendant was not time-barred. Hence, leave was granted to the second defendant to appeal to the Federal Court on the question of whether the doctrine of relation back (when the second defendant was joined in the proceedings as co-defendant, after expiry of the limitation period) deprived the second defendant from relying on the said defence.

Held (allowing appeal with costs)
Per Ramly Ali FCJ delivering the judgment of the court:

(1) The second defendant was added as a co-defendant pursuant to the plaintiff's application after the expiry of the limitation period. Under O. 20 r. 5 of the Rules of the High Court 1980 ('RHC'), the power of amendment does not extend to the amendment of adding a new defendant after the expiry of the relevant limitation period. Hence, the doctrine of relation back as envisaged under O. 20 r. 5(2) of the RHC was not applicable to an amendment to join the second defendant as a co-defendant. (para 32)

(2) In an application which falls outside the provisions of O. 20 r. 5(3), (4) and (5) of the RHC, amendments are not allowed if they would prejudice the opposing party's rights as existing at the date of the amendment. Therefore, the doctrine of relation back was not applicable in the present case and the second defendant was not deprived from relying on the said defence. The second defendant became a party to the proceedings only when the writ was amended to include it as a co-defendant but not retrospectively to the date of the issue of the original writ. Therefore, the second defendant is entitled to rely on the appropriate defence of limitation as provided for in the Act. (paras 36 & 68)

(3) The plaintiff's cause of action against the second defendant was linked closely or interrelated to the cause of action against the first defendant, *ie*, breach of contracts of employment and breach of fiduciary duty, which was based on contract and/or tort. Therefore, the action against the second defendant, who was added as a co-defendant some eight years after the original action against the first defendant was filed in court, was time-barred. (paras 44, 47 & 49)

(4) The issues of constructive trust, fraud and fraudulent breach of trust as raised by the plaintiff were vital issues in bringing into play the exceptions to limitation period under s. 22 of the Act. They must be specifically pleaded in the pleadings, failing which, they could not be allowed to be argued and to succeed on appeal. However, the issues relating to the exception to limitation period under s. 22 of the Act was only raised by the plaintiff for the first time during the hearing of this appeal. Therefore, it should not be allowed. (paras 61 & 66)

(5) Where fraud or fraudulent breach of trust is relied upon as excluding the limitation period, it must be clearly pleaded in the pleadings to bring the case within the appropriate statutory provisions. To merely plead 'breach of fiduciary duty', as had been done by the plaintiff here, was too vague and too general. Hence, the issues relating to constructive trustee, fraud, fraudulent breach of trust, dishonesty and s. 22 of the Act as raised by the plaintiff clearly amounted to a radical departure from the pleaded case of the plaintiff and therefore ought not to be allowed. (paras 58, 63 & 67)

Bahasa Malaysia *Headnotes*

Responden ('plaintif'), pengilang dan peniaga mesin pendispens cat dan dakwat dan lain-lain mesin sampingan di Malaysia, ditubuhkan oleh defendan pertama sebagai syarikat usaha sama dengan syarikat Itali. Defendan pertama pada awalnya adalah salah seorang pengarah dan pemegang saham perintis memegang 15% ekuiti dalam plaintif. Kemudian, defendan pertama meletak jawatan sebagai pengarah dan melupuskan sahamnya dalam plaintif dan menandatangani perjanjian untuk bekerja sebagai pengurus kawasan bagi plaintif, dengan gaji tetap dan komisyen jualan. Kontrak pekerjaan dan kontrak lanjutan mengandungi klausa menentang persaingan dan klausa kerahsiaan. Walau bagaimanapun, apabila defendan pertama tidak hadir bekerja tanpa apa-apa alasan dan notis yang sah, pekerjaan defendan pertama ditamatkan oleh plaintif. Defendan pertama kemudian mula bekerja dengan perayu ('defendan kedua'), sebuah syarikat yang menjalankan perniagaan, antara lain, memasang mesin pendispens. Defendan pertama adalah seorang pengarah defendan kedua. Plaintif mendakwa bahawa semasa bekerja dengan plaintif, defendan pertama menubuhkan defendan kedua dengan tujuan untuk bersaing dengan plaintif, oleh itu, bertindak melanggar kewajipan fidusiari kepada plaintif. Plaintif memfailkan guaman terhadap defendan pertama dengan dakwaan bahawa

defendan pertama melanggar terma-terma menentang persaingan dan kerahsiaan kontrak semasa pekerjaannya, dan juga selepas penamatan pekerjaannya dengan plaintif. Lapan tahun selepas permulaan guaman tersebut, defendan kedua dimasukkan dalam prosiding di Mahkamah Tinggi dan writ dan penyataan tuntutan dipinda untuk memplid kausa tindakan terhadap defendan kedua. Pembelaan defendan kedua, antara lain, adalah kausa tindakan plaintif terhadap defendan kedua (jika ada) dihadkan masa. Mahkamah Tinggi menolak tuntutan plaintif dan plaintif merayu. Di Mahkamah Rayuan, plaintif membangkitkan isu had masa, dengan menghujahkan Mahkamah Tinggi khilaf apabila memutuskan bahawa guaman plaintif terhadap defendan kedua dihadkan masa di bawah s. 6 Akta Had Masa 1953 ('Akta'). Membenarkan rayuan plaintif, Mahkamah Rayuan memutuskan bahawa kaedah am adalah bahawa writ berkait semula dengan tarikh writ asal, menjadikan tuntutan plaintif terhadap defendan kedua tidak terhad masa. Dengan itu, defendan kedua diberikan kebenaran untuk merayu ke Mahkamah Persekutuan atas persoalan sama ada doktrin 'relation back' (apabila defendan kedua digabungkan dalam prosiding sebagai defendan bersama, setelah had masa luput) menafikan defendan kedua daripada bersandar pada pembelaan tersebut.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Ramly Ali HMP menyampaikan penghakiman mahkamah:

(1) Defendan kedua digabungkan sebagai defendan bersama berikutan permohonan plaintif selepas tempoh had masa luput. Di bawah A. 20 k. 5 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), kuasa untuk meminda tidak berlanjut bagi pindaan untuk menambah defendan baru selepas tempoh had masa luput. Dengan itu doktrin 'relation back' yang dibayangkan di bawah A. 20 k. 5(2) KMT tidak diguna pakai bagi pindaan untuk menggabungkan defendan kedua sebagai defendan bersama.

(2) Dalam permohonan yang terangkum di luar peruntukan A. 20 k. 5(3), (4) dan (5) KMT, pindaan-pindaan tidak dibenarkan jika ia memudaratkan hak pihak menentang yang wujud pada tarikh pindaan dibuat. Oleh itu, doktrin 'relation back' tidak diguna pakai dalam kes ini dan defendan kedua tidak dihalang daripada bersandar pada pembelaan tersebut. Defendan kedua menjadi pihak dalam prosiding hanya apabila writ dipinda untuk memasukkannya sebagai defendan bersama tetapi bukan secara retrospektif pada tarikh writ asal dikeluarkan. Dengan itu, defendan kedua berhak bersandar pada pembelaan had masa yang sewajarnya seperti yang diperuntukkan dalam Akta.

(3) Kausa tindakan plaintif terhadap defendan kedua berkait rapat atau berhubungan dengan kausa tindakan terhadap defendan pertama, iaitu kemungkiran kontrak pekerjaan dan pelanggaran kewajipan fidusiari, yang berasaskan kontrak dan/atau tort. Oleh itu, tindakan terhadap

defendan kedua, yang dimasukkan sebagai defendan bersama, selepas lapan tahun tindakan asal terhadap defendan pertama difailkan di mahkamah, adalah terhad masa.

(4) Isu-isu amanah konstruktif, penipuan dan pecah amanah secara frod yang dibangkitkan oleh perayu adalah isu-isu penting dalam membangkitkan pengecualian bagi tempoh had masa di bawah s. 22 Akta. Ini mesti diplidkan secara spesifik dalam pliding, dan jika gagal, tidak boleh dibenarkan untuk dihujahkan dan untuk berjaya dalam rayuan. Walau bagaimanapun, isu-isu berkaitan dengan pengecualian bagi tempoh had masa di bawah s. 22 Akta hanya dibangkitkan oleh plaintif pertama kalinya semasa perbicaraan rayuan ini. Dengan itu, ini tidak wajar dibenarkan.

(5) Apabila penipuan dan pecah amanah secara frod disandarkan bagi mengecualikan tempoh had masa, ini mesti diplidkan dengan jelas dalam pliding supaya kes tersebut termasuk dalam lingkupan peruntukan statutori yang sewajarnya. Memplidkan 'pelanggaran kewajipan fidusiari' sahaja, seperti yang dilakukan oleh plaintif di sini, adalah amat kabur dan terlalu umum. Oleh itu, isu-isu berkaitan pemegang amanah konstruktif, penipuan, pecah amanah secara frod, ketidakjujuran dan s. 22 Akta yang dibangkitkan oleh plaintif jelas membentuk penyimpangan radikal daripada kes yang diplid oleh plaintif dan dengan itu tidak wajar dibenarkan.

Case(s) referred to:

Anuar Mat Amin v. Abdullah Mohd Zain [1989] 1 LNS 74 HC ***(refd)***
Blay v. Pollard & Morris [1930] 1 KB 628 ***(refd)***
Braniff v. Holland and Hannen and Cubitts (Southern Ltd) [1969] 3 All ER 959 ***(refd)***
Chatsworth Investments Ltd v. Cussins (Contractors) Ltd [1969] 1 WLR 1 ***(refd)***
Credit Corp (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***
Dato' Hamzah Abdul Majid v. Omega Securities Sdn Bhd [2015] 9 CLJ 677 FC ***(refd)***
Dow Hager Lawrence v. Lord Norreys & Ors [1890] 15 App Cas 210 ***(refd)***
Gibbs v. Guild [1881] 8 QBD 296 ***(refd)***
GL Baker Ltd v. Medway Building and Supplies Ltd [1958] WLR 1216 ***(refd)***
Government of Malaysia v. Mohamed Amin Hassan [1985] 1 LNS 79 FC ***(refd)***
Gracie Teo v. Tay Leng Hong & Ors [1987] 1 LNS 39 HC ***(refd)***
How v. Earl Winterton [1896] CA 626 ***(refd)***
Ketteman v. Hansel Properties Ltd [1987] AC 189 ***(refd)***
Koh Siew Keng & Anor v. Koh Heng Jin [2008] 3 CLJ 450 CA ***(refd)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***
Liff v. Peasley & Anor [1980] 1 All ER 623 ***(refd)***
Lucy v. WT Henley, Telegraph Works Co Ltd [1969] 3 All ER 456 ***(refd)***
Perumahan NCK Sdn Bhd v. Arab Malaysian Merchant Bank & Anor [1999] 4 CLJ 512 HC ***(refd)***
Renofac Builder (M) Sdn Bhd v. Chase Perdana Berhad [2001] 5 CLJ 371 HC ***(refd)***
Selangor Omnibus Co Ltd v. Transport Worker Union, Malaya & Ors [1968] 1 LNS 133 FC ***(refd)***

Song Lian Chye & Ors v. Tai Kian Cheong [1983] 2 CLJ 128; [1983] CLJ (Rep) 375 FC ***(refd)***
State Government of Perak v. Muniandy [1985] 1 LNS 117 SC ***(refd)***
Sterman v. EW & WJ Moore (A Firm) [1970] 1 QB 596 ***(refd)***
Tan Shiang Shong v. Tan Lee Choon & Anor [1984] 1 LNS 103 FC ***(refd)***
Thomas v. Marconi's Wireless Telegraph Co Ltd [1965] 1 WLR 850 ***(refd)***
Weldon v. Neal [1887] 19 QBD 394 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 28
Industrial Relations Act 1967, s. 20
Limitation Act 1953, ss. 6(1)(a), 22(1)
Rules of the High Court 1980, O. 20 rr. 5(1), (2), (3), (4), (5)

Other source(s) referred to:
Halsbury' Laws of Malaysia [2011] Reissue, para 510.041

For the appellant/2nd defendant - Shane Cheng; M/s Cheng Poh Heng & Co
For the respondent/plaintiff - Michael Chow & CH Cheong; M/s Michael Chow

[Editor's note: Appeal from Court of Appeal; Civil Appeal No: B-02-2717-2011 (overruled).]

Reported by S Barathi

JUDGMENT

Ramly Ali FCJ:

Introduction

[1] The appeal before us is against the decision of the Court of Appeal dated 19 September 2013 in allowing the plaintiff's appeal against the decision of the High Court dated 12 October 2011. In this judgment, the appellant will be referred to as the second defendant and the respondent as the plaintiff.

Background Facts

[2] The background facts of the appeal are summarised as follows:

(a) the plaintiff at all material times was a manufacturer and dealer of paint and ink dispensing machines as well as other ancillary machines in Malaysia, with businesses established in China, Indonesia, Thailand, Hong Kong and other countries;

(b) the plaintiff was set up by the first defendant (who is not a party to the present appeal) in 1998, as a joint venture enterprise with an Italian company known as Inkmaker Italy. The first defendant was initially one of the pioneer directors and shareholders holding 15% equity in the plaintiff;

(c) in March 2000, the first defendant resigned as director of the plaintiff and disposed off his shares in the plaintiff;

(d) thereafter, the first defendant signed an agreement dated 27 March 2000 (the first contract of employment) with the plaintiff according to which the first defendant was to work for the plaintiff as a regional manager, with a fixed salary and sales commission;

(e) the first contract of employment was for the period from 3 January 2000 to 3 April 2001. It was later extended to 1 April 2002;

(f) the contract of employment, as well as its extension, contained a non-competition clause and a confidentiality clause which reads as follows:

> Non-competition clause
>
> You will not without the previous written consent of the Company either on your own account or otherwise and whether directly or indirectly, solicit or entice the customer (in relation to goods or services dealt in or provided by any Inkmaker group of Company) other than for the benefit of the Company at any time during your employment and in the period of two years from the date you cease employment with the Company.
>
> You will not without the Company's prior written consent, be directly or indirectly engaged or interested in any competing activities, in any capacity (including without limitation through a connected person) during your employment and in the period of two years from the date you cease employment with the Company.
>
> The compensation for your agreement to these non-competition terms is included in the above salary.
>
> Confidentiality clause
>
> By accepting these terms and conditions, you will undertake and guarantee not to disclose to any party, the Company's business affairs and/or any proprietary information.

(g) the plaintiff alleged that the first defendant was absent from work without valid reason or notice and had failed to respond to a warning notice, dated 6 July 2001. In a letter dated 17 July 2001, the plaintiff terminated the first defendant's employment with the plaintiff on the basis that the first defendant had been absent from office;

(h) the first defendant, on the other hand, contended that he was on leave from 28 June 2001 to 28 July 2001 and had not received the warning notice of 6 July 2001 allegedly issued by the plaintiff to him;

(i) on 20 August 2001, the first defendant commenced employment with the second defendant, a company carrying on the business, *inter alia*, of assembling dispensing machines. The second defendant was incorporated on 8 March 2001 and the first defendant was appointed as a director of the second defendant on 18 February 2002;

(j) the plaintiff alleged that while employed with the plaintiff, the first defendant had worked towards setting up the second defendant with the purpose of competing with the plaintiff, thus acting in breach of his fiduciary duty to the plaintiff;

(k) the plaintiff also alleged that the first defendant breached his employment contract by his involvement as a director of the second defendant, which carried out a competing business with the plaintiff within the period of two years after the cessation of his employment with the plaintiff;

(l) the plaintiff further alleged that the first defendant together with the second defendant had worked to secure the plaintiff's customers resulting in the plaintiff suffering a loss of profits;

(m) meanwhile, the first defendant had lodged a complaint with the industrial relations officer pursuant to s. 20 of the Industrial Relations Act 1967, on the ground that he had been unjustly dismissed by the plaintiff and prayed for reinstatement of his position in the plaintiff company. On 26 November 2002, after mediation, a settlement was reached between the plaintiff and the first defendant as per terms *inter alia* that the first defendant was to be paid a sum of RM30,000 as *ex gratia* payment and that the payment be treated as full and final settlement and there will be no other claims in the future between the parties;

(n) the plaintiff subsequently filed the present suit against the first defendant on 21 December 2001, alleging that the first defendant had breached the non-competition and confidentiality terms of his employment contract during the currency of his employment, as well as after the cessation of his employment with the plaintiff; and

(o) initially, the plaintiff's action was against the first defendant only. The second defendant was added in the proceedings at the High Court stage on 25 June 2009 (a period of more than eight years after the commencement of the suit). The writ and the statement of claim was amended as a result, to plead a cause of action against the second defendant.

The Amended Statement of Claim

[3] The averments in the plaintiff's amended statement of claim which are as relevant for the determination of the issues before us *inter alia* are as follows:

(a) the plaintiff had since 1998 conducted its business in Malaysia and in other Asean countries. For the purpose of the plaintiff's business, the plaintiff maintained a list of its customers both within and outside Malaysia. The list sets out, among other things:

A (i) the name and particulars of the respective customers together with the contact persons of the customers; and

(ii) the past history of purchases made by the customers.

The plaintiff contended that the aforesaid information are confidential
B information and/or trade secrets of the plaintiff;

(b) the first defendant was one of the first directors and also an initial subscriber of the plaintiff's shares. The plaintiff contended that the first defendant owed a fiduciary duty to the plaintiff;

C (c) at all material times until March 2000 when the first defendant resigned as director, and disposed of his shareholding in the plaintiff, the first defendant exercised *de facto* and/or *de jure* control over the affairs of the plaintiff and had access to the plaintiff's confidential information and/or trade secrets;

D (d) beginning 27 March 2000, the relationship between the first defendant and the plaintiff is evidenced by a contract of employment dated 27 March 2000, and subsequently by a further contract of employment dated 27 March 2001 based on the terms and conditions set out therein;

(e) it was an integral part of the relationship between the plaintiff and the
E first defendant, included under the said contracts of employment that the first defendant shall not compete with the plaintiff in its business, in any event for a reasonable period of not less than two years of the termination of the subsisting relationship between the plaintiff and the first defendant, and further that the first defendant shall maintain in
F confidence all confidential information and/or trade secrets of the plaintiff which the first defendant shall acquire during the course of his employment;

(f) in addition and having regard to the first defendant's historical relationship with the plaintiff, the first defendant also owed the
G following specific duties and obligations to the plaintiff:

(i) at all times to act in the interest of the plaintiff;

(ii) at all times to act in good faith towards the plaintiff; and

(iii) not to use, disclose, copy except for the purposes of serving the
H plaintiff or advancing the plaintiff's business the plaintiff's confidential information and/or trade secrets in any event for a period of at least two years after the first defendant shall have ended his relationship with the plaintiff.

I (g) in breach of the said contracts of employment and/or the said duties and obligations owed to the plaintiff and whilst in the employment of the plaintiff, unknown to the plaintiff, the first defendant incorporated or caused to be incorporated the second defendant for the purpose of

competing with the plaintiff and thereafter approached the plaintiff's customers, to solicit or entice them to buy systems or machines from the second defendant. The first defendant has to-date sold or promoted about seven systems or machines belonging to one of the plaintiff's competitors ie, Inovex. The first defendant has also failed and/or neglected to act in the best interest of the plaintiff company;

(h) in further breach of the said contracts of employment and/or the said duties and the obligations owed to the plaintiff, the first defendant on or about 20 August 2001, purportedly commenced his new employment with the second defendant. Amongst the plaintiff's customers approached by the first defendant were DIC, Sakata, Full Land Ind. Corporation and Coates Brothers Sdn Bhd. The first defendant also jeopardised the plaintiff's business by approaching and soliciting the plaintiff's customers in countries like China, Hong Kong, Singapore, Indonesia and Thailand;

(i) the second defendant has knowledge of the aforesaid breaches by the first defendant and obtained the benefits out of the said breaches by the first defendant;

(j) since 2 July 2001, the first defendant has been absent from work without any valid reason or permission from the plaintiff. The first defendant also failed to adhere to the notices and warnings issued by the plaintiff *vide* letters dated 6 July 2001 and 17 July 2001; and

(k) due to the first defendant's conduct, the plaintiff suffered losses and damages in terms of annual return, approximately in the sum of RM950,000 for the year ending 2000 and 2001, for which losses and damages the second defendant is liable.

The Second Defendant's Defence

[4] The second defendant's defence to the plaintiff's claim is as follows:

(i) the plaintiff has no cause of action against the second defendant as the first defendant only joined the second defendant on 20 August 2001 after he was dismissed by the plaintiff;

(ii) the second defendant was not set up with the express purpose of competing with the plaintiff;

(iii) the second defendant has no knowledge of the first defendant's breaches of fiduciary duty and duty of confidentiality; and

(iv) the second defendant was incorporated at the end of August 2001 and did not make any profits.

[5] It is also the second defendant's defence that the plaintiff's cause of action against the second defendant (if any) is time-barred. (see: para. 10 of the statement of defence).

A **Decision Of The High Court**

[6] At the conclusion of the trial, the learned High Court Judge dismissed the plaintiff's claim with costs, on the following grounds:

(a) the 'non-competition' clause in the contracts of employment with the
B plaintiff amounts to a restraint of trade under s. 28 of the Contracts Act 1950;

(b) the plaintiff failed to prove its allegations that the first defendant had breached his fiduciary duty and duty of confidentiality to the plaintiff during the currency of his employment with the plaintiff ie, from
C 1 January 2000 to 17 July 2001;

(c) there was no evidence to show that the first defendant had set up the second defendant and was running the business using nominees as a façade; neither was there any evidence to show that the second defendant had knowledge of such breaches of the first defendant, if any;

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(d) there was insufficient evidence of the existence of confidential information/trade secrets in respect of which the first defendant owed a duty of confidentiality to the plaintiff;

(e) since the claim against the second defendant is premised largely on the
E second defendant's knowledge and complicity in the purported breaches of duty by the first defendant, it follows that the actions against the second defendant cannot be sustained; and

(f) in any event, the second defendant was only joined as a party to this action in 2009, when the alleged cause of action had arisen in 2000-2001
F by then, more than six years had elapsed by virtue of s. 6(1)(a) of the Limitation Act 1953 ("the Act"), the action against the second defendant was therefore time-barred.

Decision Of The Court Of Appeal

G **[7]** The plaintiff appealed to the Court of Appeal against the decision of the High Court. On 19 September 2013, the Court of Appeal allowed the appeal with costs of RM10,000 to be paid each by the first and second defendants. The matter was remitted to the High Court for assessment of damages resulting from the first defendant's breach of fiduciary duties as well
H as profits obtained by the second defendant due to the first defendant's breach.

[8] At the Court of Appeal, the plaintiff raised the issue of limitation in that the learned trial judge erred in holding that "the plaintiff's suit against the second defendant was time-barred under s. 6 of the Limitation Act."

I **[9]** On this issue, the Court of Appeal in its judgment ruled as follows:

> [40] On the last issue raised as to whether the Plaintiff's suit against D2 was time-barred under section 6 of the Limitation Act, having heard submissions of respective learned counsel, we are inclined to agree with

> Plaintiff's counsel's submission that the general rule is that an amendment to the writ relates back to the date of the original writ, so that the Plaintiff's claim against D2 was not time-barred. We also noted that whilst defence of limitation was pleaded by D2, it was curiously never an agreed issue to be tried. The learned trial judge's ruling on this issue would appear to be by the way kind of ruling.

Before This Court

[10] This court had on 4 November 2015 granted leave to the second defendant to appeal on the following question:

> whether the doctrine of relation back (when the appellant/2nd defendant was joined in the proceedings as co-defendant, after expiry of the limitation period) deprived the appellant/2nd defendant from relying on the said defence?

[11] The High Court in its judgment made no mention about this doctrine. The Court of Appeal in its grounds of judgment, had briefly dwelled on the issue of the doctrine of relation back at para. 40 that "the general rule is that an amendment to the writ relates back to the date of the original writ, so that the plaintiff's claim against D2 was not time-barred". The effect of this ruling is that the second defendant is deprived from relying on the defence of limitation as provided for in the Act.

Submissions By Counsel For The Second Defendant

[12] The gist of the second defendant's contention before us was that the doctrine of relation back, where the second defendant was joined in the proceeding as co-defendant after the expiry of the limitation period is not applicable to the present case and therefore the second defendant cannot be denied of the right of relying on the defence of limitation.

[13] Learned counsel for the second defendant submitted that the Court of Appeal erred in law and/or in fact when it agreed with the plaintiff's submissions that the general rule of relation back (ie, that an amendment to the writ relates back to the date of the original writ) was applicable when the writ was amended. The plaintiff's claim against the second defendant thus cannot be denied the right of relying on the defence of limitation.

[14] Learned counsel for the second defendants submitted that the Court of Appeal erred in law and/or in fact when it failed to consider that the joinder of the second defendant as co-defendant in the proceedings on 25 June 2009 was made some eight years after the commencement of the suit by the plaintiff on 21 December 2001 and therefore was caught by the defence of limitation which was specifically pleaded in its statement of defence. Therefore, the plaintiff's action against the second defendant which was based on contract and/or tort, was time-barred under s. 6 of the Act.

[15] Learned counsel further submitted that the power of the court in exercising its discretion to allow amendment to a writ and statement of claim after the expiry of the limitation period was confined only to cases that fall within the provisions of O. 20 r. 5(3), (4) and (5) of the Rules of the High Court 1980 for correction of names, altering the capacity of the party being sued, adding or substituting a new cause of action but should not include the adding of a new defendant to the proceedings or adding of the accrual of the cause of action, which had expired by the time the new party was joined in the proceedings.

[16] The bone of the second defendant's contention before us was that since it became a party to the proceedings at the time when the writ and statement of claim was amended on 25 June 2009, its joinder only operates to take effect on the date of the amendment. It does not relate back to the date of filing of the original writ on 21 December 2001. Consequently, it was submitted, it would be wrong to order such a joinder where the action was already time-barred by the time the application was made by the plaintiff.

Submissions By Counsel For The Plaintiff

[17] The plaintiff argued that its claim against the second defendant was to recover the trust property based on a breach of fiduciary duty, which involved an element of breach of constructive trust and fraud. Therefore, by virtue of s. 22 of the Act, the period of limitation under s. 6 of the same Act was not applicable to defeat the plaintiff's claim and the second defendant is therefore not entitled to rely on the defence of limitation.

[18] To support its contention, the plaintiff argued that since the first defendant was found by the Court of Appeal to be in breach of fiduciary duty when setting up the second defendant for the purpose of competing with the plaintiff, and the second defendant had knowledge of the said breach by the first defendant leading to benefits obtained therefrom, both the first defendant as well as the second defendant were constructive trustees for the purpose of s. 22 of the Act.

[19] The plaintiff's counsel further submitted that fraud for the purpose of s. 22 of the Act is not limited to actual fraud at common law but includes equitable fraud and a breach of trust is fraudulent, if done dishonestly. To link the second defendant to the fraud or dishonesty committed by the first defendant, the plaintiff, cited the case of *GL Baker Ltd v. Medway Building and Supplies Ltd* [1958] WLR 1216, which stressed that once it is established that there has been fraud or a fraudulent breach of trust the action may be brought against a third party who is in possession of the trust property.

[20] It was conceded orally by plaintiff's counsel during his submissions that the issue of s. 22 of the Act, together with the issues of constructive trust, as well as issues relating to fraud and fraudulent breach of fiduciary duty were not pleaded by the plaintiff in the amended statement of claim. Learned counsel also conceded orally that the issues were not raised and not argued

at the courts below and the plaintiff had not filed any reply to the second defendant's defence where the defence of limitation was pleaded by the second defendant.

Decision Of This Court

[21] We will first deal with the issue of joinder of the second defendant as the co-defendant in the present proceedings after expiry of the limitation period, and determine whether the doctrine of relation back applies and accordingly determine whether the second defendant was deprived from relying on the defence of limitation.

[22] It is not in dispute that the initial proceedings against the first defendant was filed by the plaintiff on 21 December 2001, and the second defendant was only joined as a co-defendant on 25 June 2009 ie, a period of more than eight years after the filing of the initial proceedings.

[23] The plaintiff had applied for the writ and the statement of claim to be amended. This was done pursuant to O. 20 r. 5 of the Rules of the High Court 1980 (RHC 1980). Order 20 r. 5(1) of RHC 1980 empowers the court, at any stage of the proceedings, to allow the plaintiff to amend his writ or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such a manner, if any, as it may directs.

[24] Order 20 r. 5(2) talks about the doctrine of relation back. It provides: "where an application to the court for leave to make the amendment mentioned in paras. (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the circumstances mentioned in that paragraphs if it thinks it is just to do so."

[25] The effect of r. 5(2) is that an amendment made under this rule in relation to matters under paras. (3), (4) or (5) takes effect not at the date of the application for the amendment is made to the court or the date when the application is granted by the court, but to the date of the commencement of the original action being filed in court. In other words, an application for amendment may be made, even though at the date of the application, the cause of action to which the amendment is related may have become time-barred but would not have been if it had been made at the commencement of the action. This is known as the doctrine of relation back.

[26] As expressly provided in r. 5(2), the doctrine of relation back in relation to such an application, is only applicable to the type of amendments in relation to matters mentioned in r. 5(3); r. 5(4) and r. 5(5).

[27] Rule 5(3) relates to an amendment to correct the name of a party, or to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake, and was not misleading.

[28] Rule 5(4) relates to an amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counter claim) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.

[29] Rule 5(5) relates to an amendment to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

[30] Therefore, pursuant to paras. (3), (4) and (5) of r. 5, the court may (only on matters specified therein) allow an amendment whenever it is just to do so even though it may deprive the defendant of the benefit of the defence of limitation (see: *Chatsworth Investments Ltd v. Cussins (Contractors) Ltd* [1969] 1 WLR 1).

[31] Lord Denning MR in *Sterman v. EW & WJ Moore (A Firm)* [1970] 1 QB 596 when dealing with the relevant UK's provisions which were in *pari materia* with our rules had occasion to state:

> The new rules, it is said, have cut down the power to amend. You can only amend a writ, it is said, so as to avoid the Statute of Limitations, if the case can be brought expressly within Order 20, rule 5, sub-rules (2), (3), (4) and (5): and that otherwise it is a strict rule of the court that no amendment can be allowed which would deprive a defendant of the benefit of the Statute of Limitations.

[32] In the present case, the second defendant was added as a co-defendant pursuant to the application of the plaintiff after the expiry of the limitation period. This fact is not in dispute. Reading the provision of O. 20 r. 5 of the RHC 1980, the power of amendment does not extend to the amendment of adding a new defendant after the expiry of the relevant limitation period. To borrow the words of Lord Denning MR in Sterman, "… it is a strict rule of the court that no amendment can be allowed which would deprive the defendant of the benefit of the Statute of Limitations". Therefore, the doctrine of relation back as envisaged under r. 5(2) is not applicable to an amendment to join the second defendant as a co-defendant. This doctrine is only applicable in amendments specified in r. 5(3), (4) and (5) only.

[33] We also find support for the above proposition in the decision of the House of Lords in *Liff v. Peasley & Anor* [1980] 1 All ER 623 where Stephenson LJ affirmed the relevant law on this issue that:

> … the action against the added defendant is begun at the date of the amendment joining him in the action, and so he can rely on the statute as barring the plaintiff from suing him.

[34] In the same case, Brandon LJ said:

> It is an established rule of practice that the court will not allow a person to be added as defendant to an existing action if the claim sought to be made against him is already statute - barred and he desires to rely on that circumstance as a defence to the claim.

[35] At p. 642 of the report, His Lordship said:

> There is no reason to quarrel with the general proposition that an amendment of a writ or a pleading relates back to the original date of the document amended, as stated by Lord Collins MR in *Sneade v. Wotherton Barytes and Lead Mining Co.* [1904] 1 KB 295. This seems to me to be an entirely sensible proposition so long as the amendment concerned does not involve the addition of a new party, either as plaintiff or defendant, or the raising of a new cause of action, but involves only the modification, by addition, deletion or substitution, of pleas or averments made between existing parties in respect of a cause or causes of action already raised. Where, however, the amendment concerned involves the addition of a new party or the raising of a new cause of action, it appears to me to be unrealistic and contrary to the common sense of the matter to treat it as relating back in the same way.

[36] In an application which falls outside the provisions of O. 20 r. 5(3), (4), (5), the strict rule as laid down in *Weldon v. Neal* [1887] 19 QBD 394, where amendments were not allowed if they would prejudice the opposing party's rights as existing at the date of the amendment. No amendment can be allowed which would deprive the added defendant of the benefit of the defence of limitation.

[37] There are a string of authorities on this point. One of them is - *Braniff v. Holland and Hannen and Cubitts (Southern Ltd)* [1969] 3 All ER 959, where the second defendant in that case was not allowed to be added out of time. The House of Lords in *Ketteman v. Hansel Properties Ltd* [1987] AC 189, also adopted the same proposition when it held that it has long been a rule of practice that an amendment should not be allowed for the joinder of an additional defendant in a situation where a relevant period of limitation has already expired in relation to the cause of action against him. Dealing with the theory of relation back, the House of Lords held the view that it would be unjust to join him as a defendant at a time when limitation had run in his favour because to do so would have the effect of depriving him of a valid defence. The same principle was adopted by Hashim Yeop A Sani CJ (Malaya) in the case of *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69; [1991] 1 MLJ 409.

[38] In *Government of Malaysia v. Mohamed Amin Hassan* [1985] 1 LNS 79; [1986] 1 MLJ 224, the Supreme Court likewise held that there was no authority which allowed the addition of a defendant in circumstances as to deprive him of his defence under the limitation statute particularly when the

period of limitation had expired, and there was no power to resuscitate an action which must fail *in limine* upon a plea of limitation. In that case, Syed Agil Barakbah SCJ expressed his view as follows:

> What the Magistrate's Court did in the present case was to allow amendment by allowing the respondent who was already suing as the plaintiff in the representative capacity to be added as the second plaintiff in his personal capacity after the expiration of the limitation period. That, in my opinion, violates the statutory limitation because it takes away the accrued right of the appellant to plead the lapse of limitation period. Secondly, I do not think it is the intention of legislature to allow such amendment at that stage. It is not a technical defect because it introduces a new party to the action and leave to amend should have been applied for prior to the expiry of the statutory period of limitation.

[39] The majority ruling in that case is that the power to amend the writ after any period of limitation current at the date of the issue of the writ has expired under r. 5(2) is that it is expressly confined to the type of cases mentioned in rr. 5(3), (4) and (5). As aptly said by Seah SCJ, r. 5(2) "gives to the court a discretionary power to allow an amendment albeit it is made after the expiry of the limitation period if, and only if, the special circumstances in paras. (3), (4) or (5) exist …". Lee Hun Hoe CJ (Borneo), in the same case, had also correctly observed:

> … I must say that I am not aware of any authority which allows the addition of a party in such circumstances as to defeat the defendant of his defence under the Statute of Limitation.

[40] The law in Singapore on this issue is the same. Thean J in *Gracie Teo v. Tay Leng Hong & Ors* [1987] 1 LNS 39; [1987] 2 MLJ 435, ruled that an added party to a proceeding does not become a party with effect retrospectively at the commencement of the action but on or immediately after the date the order adding it as a party was made.

[41] The same proposition was also expressed by Megaw LJ in the English Court of Appeal's decision of *Lucy v. WT Henley, Telegraph Works Co Ltd* [1969] 3 All ER 456 to the following effect:

> I am unaware of any case in which leave to amend a writ has been given in such circumstance: namely where the joinder of a new defendant would be calculated to defeat a right as to limitation which he would have had if an action were to be brought by the plaintiff against him alone.

[42] Based on the foregoing discussion and authorities, we hold that the doctrine of relation back is not applicable to the facts of the present case. We also hold that the joinder of second defendant as a co-defendant in the present proceedings is to take effect in law on the date of the court order (25 June 2009) adding it as a party, not retrospectively to the date of the commencement of the action against the first defendant.

[43] We will now determine what is the relevant limitation period under the Act applicable to the second defendant. For that purpose, we have to look at the cause of action against the second defendant as pleaded in the amended statement of claim.

[44] From the outset of the plaintiff's action against the first defendant, the plaintiff's claim against the first defendant was based on breaches of employment contracts (dated 27 March 2000 and 27 March 2001) between the first defendant and the plaintiff and a breach of fiduciary duty owed by the first defendant to the plaintiff. After the amendment to the writ and statement of claim, when the second defendant was added as a co-defendant, the plaintiff maintained the same cause of action namely breach of contracts of employment and breach of fiduciary duty. In short, the plaintiff's cause of action was based on contract and/or tort. Reading paras. 3, 4, 4B, 5, 6, 7, 8, 8A, 10, 13, 16, 17 and 18 of the amended statement of claim would clearly indicate such causes of action. Prayers (a)(i) and (ii) in para. 20 of the amended statement of claim, specifically prayed for a declaration that "the first defendant has breached the 'non-competition agreement' in the said contracts of employment between the plaintiff and the first defendant and/or the duties and obligations as pleaded in para. 5A above."

[45] In relation to the second defendant, the plaintiff submitted that the second defendant was the product of the breaches by the first defendant. Paragraphs 7, 8A and 9 of the amended statement of claim made reference to the second defendant in the following manner:

> 7. In breach of the said Contracts of Employment and/or the said duties and the obligations owed to the plaintiff and whilst in the employment of the plaintiff, but otherwise unknown then to the plaintiff, the 1st defendant incorporated or caused to be incorporated the 2nd defendant for the purpose of competing with the plaintiff and thereafter approached the plaintiff's customers … to solicit or entice them to buy systems or machines from the 2nd defendant …
>
> 8A. The 2nd defendant had knowledge of the aforesaid breaches by the 1st defendant and had obtained benefits of the said breaches by the 1st defendant.
>
> 9. Due to the 1st defendant's conduct, the plaintiff suffered losses and damages in terms of annual return approximately in the sum of RM950,000.00 for the year ending 2000 and 2001 for which losses and damages the 2nd defendant is liable.

[46] The plaintiff also prayed for an order that the second defendant provides an account of the profits as a result of the breaches by the first defendant.

[47] The plaintiff's cause of action against the second defendant therefore is linked closely or interrelated to the cause of action against the first defendant, in his conducts breaching the contracts of employment and his

A fiduciary duty toward the plaintiff. The plaintiff contended that the second defendant as the vehicle or *alter ego* of the first defendant must also be held liable for the losses and damages suffered by the plaintiff as a result of the first defendant's conduct.

B **[48]** Therefore, by linking the cause of action against the second defendant to the conduct of the first defendant, it can be concluded that the strength of the plaintiff's cause of action against the second defendant also relies on breach of contract and breach of fiduciary duty (an action in tort).

C **[49]** Based on the linkage reasoning and the statutory requirement, we therefore hold that the plaintiff's action against the second defendant, who was added as a co-defendant some eight years after the original action against the first defendant was filed in court, as being time-barred. The second defendant is therefore entitled in law to raise such a defence of limitation as in para. 10 of its statement of defence dated 16 September 2009.

D **Issues Of Constructive Trust And Fraud Under s. 22 Of The Limitation Act 1953**

[50] Before us, for the first time in the proceedings, the plaintiff raised the contention that the second defendant as a constructive trustee could not rely on the defence of limitation by virtue of s. 22(1) of the Act which provides:

E

> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action:
>
> (a) In respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> F (b) To recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

[51] Plaintiff's counsel submitted that the finding by the Court of Appeal of the complicit conduct on the part of the first defendant in setting up the G second defendant in the competing business with the plaintiff must necessarily mean that the first defendant had acted dishonestly and therefore fraudulently. Citing the decision of the Malaysian Court of Appeal in the case of *Koh Siew Keng & Anor v. Koh Heng Jin* [2008] 3 CLJ 450, as an authority, learned counsel submitted that a breach of trust is fraudulent, if it is done dishonestly.

H

[52] Learned counsel further submitted that once it is established that there has been fraud or fraudulent breach of trust as envisaged by s. 22(1) of the Act, an action may be brought against a third party (the second defendant in the present case) who is now in possession of the trust property. It was also I submitted that the present claim by the plaintiff against the second defendant being premised on the breach of fiduciary duty on the part of the first defendant which would be fraudulent, would fall within para. (a) of s. 22(1) of the Act.

[53] Our observation is that plaintiff's counsel was going against the tide of his own pleadings, and the findings of the Court of Appeal in its favour that the first defendant was "breaching his fiduciary duty to the plaintiff in his contracts of employment" when in his submissions, he contended:

> It is therefore clear that the question of law posed by the Appellant is at best hypothetical resting on an erroneous assumption that the appellant was entitled to raise limitation as a defence. The appellant seems to proceed on the basis that it is entitled to invoke section 6(1)(a) of the Act which is the prescribed period of limitation for claims in contract or tort. The claim against the appellant by the respondent is neither tortuous nor contractual in nature.

[54] It is not in dispute that the issues of constructive trust, fraud, fraudulent breach of trust, dishonesty and the application of s. 22 of the Act were only raised for the first time by the plaintiff's counsel at the hearing of the present appeal before us. The issues were not raised at all in the courts below. The issues were neither pleaded in the plaintiff's pleadings, nor in the amended statement of claim when the second defendant was added as a co-defendant. Neither had the plaintiff filed any reply to the second defendant's statement of defence when the second defendant pleaded the defence of limitation. The plaintiff's counsel also conceded before us that these matters were never pleaded and raised in the courts below.

[55] The Court of Appeal did hold that the first defendant was in breach of his fiduciary duty to the plaintiff under his contracts of employment in relation to the non-competitive clause and the doctrine of relation back applied to the second defendant's joinder as a party; and as such the plaintiff's action against the second defendant was not time-barred. On the other hand, there was no mention of s. 22 of the Act, fraud, fraudulent breach of trust, dishonesty and constructive trust in the judgment. These issues were also not considered by the High Court or the Court of Appeal in their judgments. Apparently, learned counsel for the second defendant was caught by surprise when the issues were raised before us at the hearing of the appeal.

[56] Learned counsel for the plaintiff submitted that as the plaintiff's claim was a claim by a beneficiary under a trust to recover trust property in the possession of the trustee ie, the second defendant, the relationship between the plaintiff and the second defendant (through the first defendant) as evinced by the facts and circumstances showed by implication establish the existence of a constructive trust. Alternatively, it was submitted that as the first defendant was dishonest when breaching the fiduciary duty to the plaintiff, an act which amounted to fraud or fraudulent breach of trust, the plaintiff's claim therefore falls under para. (a) of s. 22(1) of the Act.

[57] In this regard, we find that we can do no better than to respectfully adopt what Syed Agil Barakbah CJ said in the decision of this court in *Tan Shiang Shong v. Tan Lee Choon & Anor* [1984] 1 LNS 103; [1985] 2 MLJ 369 which reads as follow:

> We do not consider that this argument can serve any useful purpose. First, there is nothing to show in the pleadings that this is an action by a beneficiary under a trust in the absence of any averment and/or prayer for a declaratory order for the purpose. Secondly, the question whether it is a constructive trust and whether the issue actually falls under the provision of section 22 has not been properly argued before us and no authorities in support of the counsel's argument have been cited. We are of the view that in order to apply the statutory exception of the section it is necessary to show that a trust exists *viz*. that the property is subject to a trust and a person has entered into possession or received the rent of that property with full notice of the trust thus showing a fiduciary capacity. (*Halsbury's Laws of England*, 4th Ed. Vol. 28 page 375 para 842). Whether or not a trust has commenced is a question of fact.

We fully agree with the above statement.

[58] It is also our view that where fraud or fraudulent breach of trust is relied upon as excluding the limitation period, it must be clearly pleaded in the pleadings to bring the case within the appropriate statutory provisions. (see: *Halsbury' Laws of Malaysia* [2011] Reissue, para 510.041; *Tan Shiang Shong v. Tan Lee Choon (supra)*; *Gibbs v. Guild* [1881] 8 QBD 296 and *How v. Earl Winterton* [1896] CA 626).

[59] In a similar vein, the House of Lords in *Dow Hager Lawrence v. Lord Norreys & Ors* [1890] 15 App Cas 210, HL, when dealing with the issue of concealed fraud within s. 26 of the Statute of Limitations (UK) held:

> In such an action general averments of fraud are not sufficient: the statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the deprivation, and excluding other possible causes. In default of such allegations the court may, by virtue of its inherent jurisdiction, dismiss the action as an abuse of the procedure, where the claim is incapable of proof and without any solid basis.

[60] It is a cardinal rule that parties are bound by their pleadings and are not allowed to adduce facts and submissions on matters which they had not pleaded. Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. (see: *State Government of Perak v. Muniandy* [1985] 1 LNS 117; [1986] 1 MLJ 490; *Anuar Mat Amin v. Abdullah Mohd Zain* [1989] 1 LNS 74; [1989] 3 MLJ 313; and *Blay v. Pollard & Morris* [1930] 1 KB 628).

[61] The issues of constructive trust, fraud and fraudulent breach of trust as raised by the plaintiff are vital issues in bringing into play the exceptions to the limitation period under s. 22 of the Act. They must be specifically pleaded in the pleadings, failing which, as rightly held by the Supreme Court in *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; [1991] 1 MLJ 428, they "could not be allowed to be argued and to succeed on appeal."

[62] The plaintiff's counsel argued that even though the plaintiff did not plead 'fraud', it had pleaded 'breach of fiduciary duty as against the first defendant.' As regard to the second defendant, the plaintiff's counsel contended that the second defendant was the product and the result of the breach of fiduciary duty caused by the first defendant, as stated in paras. 7 and 8A of the amended statement of claim and once the first defendant whom the plaintiff claimed to be a constructive trustee, caused the incorporation of the second defendant, it means that the second defendant is also a constructive trustee.

[63] We have perused the entire amended statement of claim filed by the plaintiff, and found that the issues in question were not pleaded by the plaintiff. To merely plead "breach of fiduciary duty" is too vague and too general. The pleadings on this issue must not be left vague and undefined. They ought to be pleaded with distinctness and precision (see: *Dow Hager Lawrence v. Lord Norreys and Ors (supra)*).

[64] Pleadings must specifically and expressly state the facts and not the law (see: *Song Lian Chye & Ors v. Tai Kian Cheong* [1983] 2 CLJ 128; [1983] CLJ (Rep) 375; [1983] 2 MLJ 222 (FC). If the plaintiff intends to rely on the exception to limitation period under s. 22 of the Act, material factual elements as to the existence of a trust, trust property, existence of fiduciary duty, fraud and fraudulent breach of trust must be pleaded. In *Renofac Builder (M) Sdn Bhd v. Chase Perdana Berhad* [2001] 5 CLJ 371; [2001] 2 AMR 1639 the court took the view that all material facts must be pleaded in the statement of claim and failure to plead one material fact is fatal. In short, particulars of fraud and breach of trust must be pleaded.

[65] Abdul Aziz Mohammed J (as he then was) had correctly ruled in *Perumahan NCK Sdn Bhd v. Arab Malaysian Merchant Bank & Anor* [1999] 4 CLJ 512; [1999] 4 AMR 4612, that:

> A prospective plaintiff should before plunging into litigation ensure upon sufficient preparation that he is able to make out a case. Failure to do so, would render the pleadings wanting in particulars, and upon a request being made for such particulars, the action may be deemed to be speculative litigation. Such speculative litigation [as was revealed in the Wharf case] is an abuse of the process of the court, and would be enormously and unfairly burdensome to a defendant and should not be allowed to continue.

[66] As stated earlier in this judgment, the issues relating to the exception to limitation period under s. 22 of the Act was only raised by the plaintiff for the first time during the hearing of this appeal before us, but not in the courts below. That should not be allowed. As correctly expressed by Willmer LJ in *Thomas v. Marconi's Wireless Telegraph Co Ltd* [1965] 1 WLR 850 (cited with approval by this court in *Selangor Omnibus Co Ltd v. Transport Worker Union, Malaya & Ors* [1968] 1 LNS 133; [1968] 1 MLJ 242): "It is right that an appellant should be precluded from raising here for the first time a point not taken below". We fully agree.

[67] In the recent case of *Dato' Hamzah Abdul Majid v. Omega Securities Sdn Bhd* [2015] 9 CLJ 677; [2015] 6 MLRA 677, this Federal Court ruled that any radical departure from the pleaded case which is not just a variation, modification or development of what has been alleged in the pleading in question, must be specifically pleaded. Any unpleaded matter ought to be disregarded by the court. In the present appeal, it is our finding that the issues relating to constructive trustee, fraud, fraudulent breach of trust, dishonesty and s. 22 of the Act as raised by the plaintiff's counsel clearly amounted to a radical departure from the pleaded case of the plaintiff as appeared in its amended statement of claim and therefore ought not to be allowed.

Conclusion

[68] For the above reasons, our answer to the question posed is as follow:

> The doctrine of relation back (when the 2nd defendant was joined in the proceedings as a co-defendant, after expiry of the limitation period) is not applicable in the present case and therefore the 2nd defendant was not deprived from relying on the said defence. The 2nd defendant became a party to the proceedings only when the writ was amended to include it as a co-defendant but not retrospectively to the date of the issue of the original writ. Therefore, the 2nd defendant is entitled to rely on the appropriate defence of limitation as provided for in the Act.

[69] Accordingly, we hold that the Court of Appeal erred in its finding "that the general rule is that an amendment to the writ relates back to the date of the original writ, so that the plaintiff's claim against defendant 2 (the second defendant) was not time-barred."

[70] In the upshot, we allow the appeal with costs and we set aside the decision of the Court of Appeal and affirm the decision of the High Court. We hold that under s. 6(1)(a) of the Act, the plaintiff's claim against the second defendant is time-barred.